A

KOONG SWEE KWAN v. PP

COURT OF APPEAL, PUTRAJAYA
YAACOB MD SAM JCA
ZABARIAH MOHD YUSOF JCA
RAVINTHRAN PARAMAGURU JCA
B [CRIMINAL APPEALS NO: W-05(M)-494-10-2017
& W-05(SH)-516-11-2017]
1 JUNE 2020

C ***CRIMINAL LAW:*** *Penal Code – Section 302 – Murder – Accused charged for offence of murder – Eyewitnesses testified seeing accused shooting victims – Circumstantial evidence put accused at scene of crime – Consideration of quality of dock identification – Omission to tender CCTV recording – Whether caused gap in prosecution's case – Prima facie case – Whether established – Whether defence afterthought, bare denial and concoction*

D

CRIMINAL LAW: *Penal Code – Section 307(1) – Attempted murder – Accused convicted for offence of attempted murder – Eyewitnesses testified seeing accused shooting victims – Circumstantial evidence put accused at scene of crime – Consideration of quality of dock identification – Omission to tender CCTV recording – Whether caused gap in prosecution's case – Prima facie case – Whether*
E *established – Whether defence afterthought, bare denial and concoction – Whether conviction of accused safe*

CRIMINAL PROCEDURE: *Sentence – Appeal against conviction and sentence – Accused convicted for offences of murder and attempted murder – Eyewitnesses*
F *testified seeing accused shooting victims – Circumstantial evidence put accused at scene of crime – Consideration of quality of dock identification – Omission to tender CCTV recording – Whether caused gap in prosecution's case – Prima facie case – Whether established – Whether defence afterthought, bare denial and a concoction – Whether conviction of accused safe – Penal Code, ss. 302 & 307(1)*

G The appellant was charged with the murder of a 75-year-old man under s. 302 of the Penal Code and the attempted murder of the man's wife under s. 307(1) of the Penal Code. The prosecution tendered direct eyewitness evidence and circumstantial evidence to prove the case. SP13, the wife of the deceased, testified that she and the deceased were walking towards the main
H gate of a temple they had visited when she heard what sounded like firecrackers going off. SP13 had then felt pain and fallen down and the deceased then fell on her lap. SP13 looked up and saw a man standing three or four feet away from them, holding a gun, who shot her husband at close range and ran away. SP13 identified him as the appellant during the identification parade and in court. The second crucial eyewitness for the
I prosecution was one of the caretakers of the temple, SP14, who saw a man

loitering suspiciously outside the main door. She identified the appellant as the said man, who she saw, was following the deceased and his wife hurriedly, with something in his hand resembling a pistol. She said he shot the deceased and his wife about five times, did something to his pistol and shot the fallen couple again at close range. The witnesses who provided circumstantial evidence to support the prosecution were SP3 and SP15. SP3 was a taxi driver who claimed he had met the appellant at the food stall in the temple compound on the appellant's request. The appellant had asked SP3 to wait for him, and SP3 said that he will wait in his taxi. Some time later, SP3 heard the sound of firecrackers and then saw the appellant running to SP3's parked taxi and had asked SP3 to drive off as he had 'completed his task.' SP15 was an acquaintance of the appellant who had picked up the appellant on the day in question and drove him to the said temple. The appellant had asked SP15 to go to the food stall inside the temple, which was where he met SP3. While at the food stall, he heard the sound of firecrackers going off. The medical and forensic evidence tendered by the prosecution showed that multiple gunshot wounds to the deceased's chest, especially the gunshot to the heart, had caused instantaneous death. SP13 had also suffered gunshot wounds to the left arm and right thigh and was hospitalised for several days. SP7, the police forensic officer, found seven 9mm bullet casings at around the spot where the deceased was slain. SP11 examined the CCTV video recordings from the temple and said that the appellant was present at the scene of the crime at the time of the shooting. The appellant's defence was one of denial as he denied carrying a pistol or shooting the deceased or his wife. According to the appellant, it was SP3 and SP15 who shot at the victims, and that he fled with SP3 because he was afraid. The Judicial Commissioner ('JC') disbelieved the defence of the appellant and found that the conduct of the appellant was not consistent with that of an innocent man. The JC also held that the defence of the appellant did not raise a reasonable doubt. In the premises, the JC found that the prosecution had established a *prima facie* case in respect of the two charges against the appellant. The appellant was convicted of committing both offences in the High Court and was sentenced to death for the murder charge and imprisonment for 18 years for the attempted murder charge. The appellant thus appealed against his conviction in respect of both charges. The issues that arose were (i) whether the JC had misdirected himself when he stated that the defence was not put to the relevant prosecution witnesses; (ii) whether the JC erred in accepting SP3's evidence at face value; (iii) whether the prosecution failed to tender the identification parade report; (iv) whether the CCTV recording was tendered; (v) whether the explanation of the appellant for fleeing to Taiping was not considered; and (vi) whether the JC had erred when he criticised the defence as an afterthought, a bare denial and a concoction.

A B C D E F G H I

Held (dismissing appeal; affirming conviction and sentence)
Per Ravinthran Paramaguru JCA delivering the judgment of the court:

(1) The JC did not disbelieve the appellant solely on the assumption that parts of the defence were not put to prosecution witnesses. The JC had considered the crucial eyewitness evidence of SP13 and SP14. SP13 unhesitatingly told the court that she identified the appellant as the shooter who fired the shots in cold blood as she and her husband lay on the ground. SP14 also identified the appellant as the person who lingered outside the temple before tailing the deceased and SP13 when they left the temple, and saw him taking out something that resembled a gun and shooting the couple. These crucial witnesses had good opportunity to identify the appellant as the incident occurred in bright daylight. The identification by SP13 and SP14 was not made on a fleeting glimpse of the appellant. Furthermore, there was no suggestion that SP13 and SP14 would have any reason to falsely implicate the appellant, a total stranger, in the shootings. In the premises, even if the JC erroneously misdirected himself by stating that the defence that others were responsible for the shooting was not put to SP13 and SP14, any other judge who had correctly directed himself would have come to the same conclusion on the evidence. Insofar as SP3 and SP15 were concerned, the JC considered their evidence as corroborative of the evidence of SP13 and SP14. Their evidence placed the appellant at the scene. But the finding of the JC that the appellant shot the deceased was mainly based on the evidence of SP13 and SP14. Thus, another judge who correctly directed himself on this point, would not have reached a different conclusion. No substantial miscarriage of justice was occasioned by the misdirection on the part of the JC. By virtue of s. 60 of the Courts of Judicature Act 1964, the appeal could not succeed on the said ground of misdirection alone. (paras 25-28)

(2) The assessment of credibility of a witness is the domain of a trial judge. SP3 was a competent witness. He was not charged as an accomplice and his evidence did not require corroboration. The evidence that SP3 was also arrested and investigated by the police and that he was subsequently charged for a firearm offence was before the JC. However, ballistics examination confirmed the said firearm was not the same firearm used to kill the deceased. By the time SP3 testified in court, he was freed from the charge in question. After considering his testimony, the JC concluded that SP3's evidence was credible. There was no reason to find fault with the finding of the JC. In any event, the evidence of SP3 was consistent with that of SP13 and SP14 who categorically stated that it was the appellant who killed the deceased and not SP3 or SP15. (paras 30 & 31)

(3) The reason for not tendering the identification report was not made known. Nonetheless, this was not fatal to the case of the prosecution because the absence of an identification parade does not necessarily mean that the dock identification by a witness loses value. The prosecution did not rely solely on the evidence of dock identification of one witness. Apart from the evidence of SP13, the prosecution also relied on other evidence to identify the appellant as the shooter. There was crucial evidence by SP14 who noticed the appellant through the temple window and there were the still images taken from the CCTV recording showing that the appellant had followed the victims when they emerged from the temple. Finally, the quality of the dock identification of SP13 must also be considered. The appellant had shot her and her husband in cold blood at point blank distance. The JC accepted her evidence in court. Thus, the failure of the prosecution to tender the identification parade report was of no consequence. (paras 33 & 35)

(4) SP6 testified that he viewed the CCTV recording of the shooting incident and determined that the shooter was the appellant. The appellant criticised the omission to tender the CCTV recording but did not explain how the omission prejudiced the defence. Firstly, the prosecution did not suppress any evidence as a copy of the recording was given to the defence. If there was something in the recording that was favourable to the appellant, the defence could have brought it to the attention of the court. Secondly, numerous still images of the scene of the crime and the appellant that were taken from the CCTV recording were tendered in court. Thus, the omission to tender the CCTV recording did not cause a gap in the prosecution's case. Furthermore, the JC had relied primarily on the unshaken eyewitness testimony of SP13 and SP14 in convicting the appellant. (para 38)

(5) The JC had considered carefully the defence of the appellant and compared it with the evidence presented by the prosecution. The appellant told the court that he had ran away to Taiping because he was worried after seeing a television report of the shooting incident. The JC did not accept his explanation as being consistent with his innocence after considering the overall circumstances of the case. The appellant claimed that he had been invited to the temple food stall in question to discuss some matter with SP3 but he was unable to reveal the reason that he was called by SP3. After being arrested in Taiping, he did not tell the investigating officer that it was SP3 and SP15 who shot the deceased and his wife. That was the earliest opportunity for him to disclose his defence. For all the above reasons, JC disbelieved the appellant and also found that his defence did not raise reasonable doubt. It was an afterthought and a concoction. The JC had not erred in making his finding. The conviction of the appellant on the charge of murder and the charge of attempted murder was therefore safe. (paras 40, 41 & 42)

Case(s) referred to:
Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Budhsen v. State of UP [1970] Cri LJ 1149 ***(refd)***
Lim Tiong Seng & Satu Lagi lwn. PP [2011] 5 CLJ 1 CA ***(refd)***
Mohd Jamail Abdul Ghani v. PP [2013] 1 LNS 381 CA ***(refd)***
Ong Poh Cheng v. PP [1998] 4 CLJ 1 CA ***(refd)***
PP v. Abdul Manaf Muhamad Hassan [2006] 2 CLJ 129 FC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 60(1)
Criminal Procedure Code, s. 422

For the appellant - Hisyam Teh Poh Teik; M/s Teh Poh Teik & Co
For the respondent - Umar Saifuddin Jaafar & Tetralina Ahmed Fauzi; DPP

[Editor's note: Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45B-77-12-2013 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Ravinthran Paramaguru JCA:

Introduction

[1] The appellant was charged with the murder of a 75 year old man and the attempted murder of his wife. For ease of reference, we set out below the said charges:

> First Charge
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> Bahawa kamu pada 29.07.2013 jam lebih kurang 1.30 petang hingga 2.00 petang di tempak letak kereta Tokong Cina Kuan Yin, No. 4, Lorong Ceylon, di dalam Daerah Dang Wangi, Wilayah Persekutuan, Bandaraya Kuala Lumpur telah melakukan pembunuhan ke atas Hussain Ahmad Najadi, dengan itu melakukan kesalahan di bawah seksyen 302 Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.
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> Second Charge
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> Bahawa kamu pada 29.07.2013 jam lebih kurang 1.30 petang hingga 2.00 petang di tempak letak kereta Tokong Cina Kuan Yin, No. 4, Lorong Ceylon, di dalam Daerah Dang Wangi, Wilayah Persekutuan, Bandaraya Kuala Lumpur dengan niat telah melakukan perbuatan cubaan membunuh sehingga menyebabkan kecederaan kepada Cheong Mei Kuen, dengan itu melakukan kesalahan di bawah seksyen 307(1) Kanun Keseksaan dan boleh dihukum di bawah peruntukan yang sama.

[2] The appellant was convicted of committing both offences in the High Court. He was sentenced to death for the murder charge and he was sentenced to imprisonment for 18 years from date of arrest for the attempted murder charge. He has now appealed against his conviction in respect of both charges.

Case For Prosecution

[3] The prosecution tendered direct eyewitness evidence and circumstantial evidence to prove the case. SP13 (Cheong Mei Kuan) told the court that on 29 July 2013, she and her husband ('the deceased') went to the Kuan Yin Temple in Jalan Ceylon, Kuala Lumpur. The deceased had been requested by two female caretakers of the temple to explain the terms of a sale and purchase agreement in respect of a landed property. The buyer was one Richard Morais. SP13 said that the deceased, the caretakers of the temple and Richard Morais had a cordial discussion about the terms of the sale of the property.

[4] After the discussion was over half an hour later, the deceased and his wife (SP13) left. As SP13 and the deceased walked towards the main gate of the temple, she heard what sounded like firecrackers going off. She felt pain and fell down. She heard firecracker sound again. The deceased then fell on her lap. Both deceased and SP13 landed on their back. She looked up and saw a man in front of them three to four feet away. He was holding a gun. She covered the chest of her fallen husband in a vain attempt to shield him. However, the man shot her husband at close range. He then ran away. She identified him as the appellant during the identification parade and in court. She underwent surgery and spent eight days at the hospital. During cross-examination, she denied that there were two men at the scene. She also denied that the appellant was holding a black handphone and offered her assistance. She was certain that the appellant was the only shooter.

[5] The second crucial eyewitness for the prosecution was one of the caretakers, namely SP14 (Lim Sook Yee). She told the court that while the discussion inside the temple was going on, she could see a man loitering suspiciously outside the temple main door. He was walking up and down and looking inside the temple through a window. After the discussion was over, she saw the face of the man very clearly as it was bright outside the temple. She saw him from a distance of three to four feet through a window. She identified the appellant as the said man in the identification parade and in court. When the deceased and wife left the temple, she noticed that the man followed them hurriedly. He was holding something in his hand which resembled a pistol. She said he shot the deceased and his wife about five times. She said SP13 fell down first and then the deceased fell on her. The man then did something to his pistol and shot the fallen couple again at close range.

[6] The witnesses who provided circumstantial evidence to support the case of the prosecution are SP3 (Chew Sian Chee) and SP15 (Wong Chee Meng). SP3 drove the getaway car for the appellant. He is a taxi driver. On the day in question, the appellant asked SP3 to pick him up from Jalan Ceylon between 11.30am and 1.30pm. SP3 called the appellant after reaching the vicinity of the temple. The appellant told him to eat at the food

stall in the temple compound. He met the appellant later at the food stall. SP15 joined them briefly. The appellant asked SP3 to wait longer. SP3 told him that he will wait in his taxi and told him where it is. The appellant then left. Sometime later, SP3 heard the sound of firecrackers. After that, the appellant ran to SP3's parked taxi. He asked SP3 to drive off as he had "completed his task". The appellant alighted from the taxi in the Bukit Bintang area. SP3 later found an ammunition magazine at the front passenger seat where the appellant sat. He called the appellant and asked him if he left anything in the car. The appellant did not say anything but asked to be picked up again at Bukit Belimbing. SP3 did not touch the ammunition magazine. The appellant again sat in the front passenger seat and was dropped off after a short ride. SP3 noticed that the ammunition magazine was not in the car anymore.

[7] SP15 told the court that he is an acquaintance of the appellant. He picked up the appellant on the day in question and drove him to the said Kuan Yin Temple. The appellant asked him to go to the food stall inside the temple compound to have a drink. He met SP3 at the food stall. SP15 then returned to his car. The appellant asked him to keep a lookout for a particular car. He was not sure but he thought the number of the car was 4411. After waiting in his car for short while, he returned to the food stall. While at the food stall, he heard the sound of firecrackers going off.

[8] The medical and forensic evidence tendered by the prosecution was as follows. SP1 (Dr Nurul Kharmilah) was the pathologist who carried out the autopsy on the body of the deceased. She found seven gunshot entry wounds on the body. Four gunshot entry wounds were found on the front of the body and whereas three gunshot entry wounds were found in the back. She also found six exit gunshot wounds. She determined that the multiple gunshots to the chest especially the gunshot to the heart caused instantaneous death. SP12 (Dr Yong Chee Khuen) treated SP13 at the Prince Court Medical Centre, Kuala Lumpur. She said that SP13 suffered gunshot wounds to the left arm and right thigh. She lost as much as 30% of her body volume of blood. She was hospitalised for eight days.

[9] SP7 (DSP Zuraimi bin Zam Zam), the police forensic officer found seven 9mm bullet casings at around the spot where the deceased was slain. SP11 (ASP Tay Chew Thwa @ Rico Tay) examined the CCTV video recordings from the temple. He said that the appellant was present at the scene of crime at the time of the shooting.

Finding Of High Court At The End Of Prosecution's Case

[10] The learned Judicial Commissioner correctly identified the ingredients of the offence of murder and attempted murder at the end of the case for the prosecution. He made the following findings on the evidence.

[11] In respect of the murder charge, the learned Judicial Commissioner accepted the evidence of the SP1 in respect of the cause of death. He found that the deceased died of multiple gunshots to the chest. He accepted the evidence of the police officers and SP13 who identified the body of the deceased. In respect of the person who caused the death of the deceased, he found that SP13 and SP14 are credible witnesses. Both witnesses testified unwaveringly that the appellant was the shooter at the crime scene. The learned Judicial Commissioner also accepted the testimony of SP3 and SP15. Their evidence placed the appellant at the scene of crime. In respect of element of intention, the learned Judicial Commissioner relied on inferential evidence. From the number of shots fired at the deceased at close range including the shots fired after he fell face up onto the ground, the learned Judicial Commissioner inferred that the appellant had intention to kill him. In the premises, the learned Judicial Commissioner found that the prosecution had established a *prima facie* case in respect of the first charge.

[12] In respect of the attempted murder charge, the learned Judicial Commissioner accepted the evidence of SP13 that the appellant shot at her and her husband. He considered the medical evidence in respect of the injuries suffered by SP13. The doctor who treated her at the Prince Court Medical Centre said that SP13 would have died from blood loss and shock if not for medical intervention. In the premises, the learned Judicial Commissioner found that there was *prima facie* evidence that the appellant attempted to murder SP13 and caused hurt by his act.

The Defence

[13] The appellant gave sworn evidence. He said that on the day in question he went to the food stall located in the Kuan Yin Temple compound in Jalan Ceylon around noon time at the invitation of SP3. Upon arrival, he joined SP3 and SP15 who were seated at a table. The appellant could not hear what SP3 and SP15 were talking about. Sometime later, they dispersed. SP3 walked towards the temple and loitered around there whereas the SP15 went to the parking lot. The appellant noticed that something that looked like a pistol was tucked at their waist. He then heard the sound of firecrackers. He saw a couple collapsing at the parking lot that time. SP3 and SP15 were at the parking lot. The appellant said they held a pistol. At first, the appellant went towards the couple with intention to help. But he became afraid and decided to flee. He saw SP3 leaving the scene in his taxi. The appellant decided to go with him. He asked SP3 why he shot the couple but the latter did not reply. Later, the appellant saw a news report on television about the incident. He became worried and went to stay in his friend's house in Taiping. He denied carrying a pistol or shooting the deceased or his wife.

[14] The only other witness to testify for the defence was a retired police officer (SD2). He studied the photographs from the crime scene and the post mortem report. He opined there was more than one shooter as there were

A entry wounds on the front and back of the body of the deceased. He also opined that the absence of gunshot residue (GSR) in this case meant that the victims were not shot at close range.

Finding Of High Court At End Of Defence

B **[15]** The learned Judicial Commissioner disbelieved the defence of the appellant that SP3 and SP15 were the shooters who killed the deceased and injured his wife. He said that the suggestion that SP3 and SP15 were the shooters was not put to the prosecution witnesses. He also disbelieved the version of the appellant that he was invited to the temple food stall for a discussion with SP3. The appellant could not say what matter SP3 wanted C to discuss with him at the temple. The learned Judicial Commissioner also noted that although appellant sat at the same table as SP3 and SP15, he claimed that he could not hear their conversation.

[16] The learned Judicial Commissioner found that the conduct of the D appellant was not consistent with that of an innocent man. The appellant ran away to Taiping upon watching the news report of the murder on television that night. The learned Judicial Commissioner found it curious that the appellant said that SP3 killed the deceased but he saw fit to leave the crime scene in the former's taxi instead of calling the police. The appellant also E agreed that when he was arrested in Taiping, he did not tell the police that it was SP3 and SP15 who killed the deceased. For all the above reasons, he disbelieved the denial of the appellant.

[17] The learned Judicial Commissioner rejected the opinion evidence of SD2 on the ground that it was based only on documents that he examined. F SD2's opinion was that there were two shooters at the scene as the deceased was shot from the front and back based on the autopsy report. However, the learned Judicial Commissioner found that the entry wounds on the front and back of the body of the deceased was explained by the eyewitness evidence. SP14 saw the appellant shooting the deceased in the back at a distance of G 30m. She subsequently saw the appellant shooting the deceased at close range in the front of his body after he fell to the ground. The learned Judicial Commissioner also noted that SD2 agreed that the gunshot residue which is normally present when someone is shot at close range can disappear due to wind or rain.

H **[18]** The learned Judicial Commissioner also inferred from the injuries suffered by SP13 that the appellant intended to kill her. In the premises, he held that the defence of the appellant did not raise a reasonable doubt on the case of the prosecution in respect of the both charges. He convicted the appellant on both charges.

I

Issues

[19] The main and somewhat broad ground of appeal canvassed by learned counsel is that the Judicial Commissioner erred when he failed to adequately appreciate the defence of the appellant. The sub-issues raised by counsel for appellant are as follows:

(i) that the learned Judicial Commissioner misdirected himself when he stated that the defence was not put to the relevant prosecution witnesses;

(ii) that the learned Judicial Commissioner erred in accepting SP3's evidence at face value;

(iii) the prosecution failed to tender the identification parade report;

(iv) the gun recovered from SP3 and the ballistics report were not tendered in court;

(v) the CCTV recording was not tendered;

(vi) the explanation of the appellant for fleeing to Taiping was not considered;

(vii) that the learned Judicial Commissioner erred when he criticised the defence as afterthought, a bare denial and a concoction.

Misdirection

[20] In para. 45 of the judgment, the learned Judicial Commissioner said that the defence of the appellant that SP3 and SP15 loitered outside the temple and shot the deceased and wife was not put to the prosecution witnesses. In para. 48 of the judgment, the learned Judicial Commissioner said that the denial of SP3 and SP15 that they shot the deceased and wife was not challenged. Counsel for appellant submitted that the learned Judicial Commissioner misdirected himself in making the above statements in his judgment.

[21] We perused the notes of proceedings. The suggestion that SP3 and SP15 shot the deceased and his wife was put to SP3 when he was cross-examined. The suggestion that SP3 gave a pistol to SP15 to shoot the deceased and wife was put to SP15 when the latter was cross-examined by counsel for the appellant at the trial. In the premises, the Judicial Commissioner erred when he said that the defence of the appellant was not put to SP3 and SP15. Counsel for the appellant also submitted in the same vein that learned Judicial Commissioner erred in para. 48 of his judgment when he stated that the testimony of SP13 and SP14 that the appellant shot the deceased at the back and front of his body was not challenged. When SP13 was cross-examined, counsel for appellant put to her that two other persons fired the shots in question and that the appellant approached her while holding only a handphone to offer assistance. And when SP14 testified, it was put to her that the appellant only held a handphone in his hand and not a gun.

[22] Therefore, we agree with learned counsel for the appellant that the learned Judicial Commissioner erred when he said that the evidence of SP13 and SP14 were not challenged. However, the misdirection of a trial judge in considering the evidence or the law will not automatically earn an acquittal or a retrial for a convicted person unless it is sufficiently serious to cause a miscarriage of justice. The eventuality of judicial misdirection in the course of a criminal trial has been anticipated and provided for in written law. Section 60 of the Courts of Judicature Act 1964 ('CJA') which states the powers of the Court of Appeal when hearing criminal appeals contains the following important proviso:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal **if it considers that no substantial miscarriage of justice has occurred**. (emphasis added)

[23] This provision echoes s. 422 of the Criminal Procedure Code that reads as follows:

> Subject to the provisions contained in this Chapter no finding, sentence or order passed or made by a Court of competent jurisdiction shall be reversed or altered on account of-
>
> (a) any error, omission or irregularity in the complaint, sanction, consent, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceeding under this Code;
>
> (b) the want of any sanction; or
>
> (c) the improper admission or rejection of any evidence,
>
> **unless such error, omission, irregularity, want, or improper admission or rejection of evidence has occasioned a failure of justice**.
>
> (emphasis added)

[24] As noted by the Federal Court in *PP v. Abdul Manaf Muhamad Hassan* [2006] 2 CLJ 129, the expressions "miscarriage of justice" and "failure of justice" mean the same thing, ie, when justice fails or miscarries. The principle that a conviction should only be overturned if the misdirection in question occasions a failure of justice or miscarriage of justice has been applied in a number of cases by our superior courts. In *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381, the Federal Court pronounced that a conviction will be upheld despite a misdirection if the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. This decision was followed in *PP v. Abdul Manaf Muhamad Hassan* (*supra*). In that case, the Federal Court said that the Court of Appeal should have applied the proviso to s. 60 of the Courts of Judicature Act 1964 to affirm the conviction despite the misdirection by the High Court as there was overwhelming evidence. In *Ahmad Najib Aris v. PP* [2009] 2 CLJ 800,

the Federal Court speaking through Zulkefli Makinudin FCJ said that the appellate court has the power to review or to re-evaluate all the evidence available as adduced by the prosecution. And in the Court of Appeal case of *Mohd Jamail Abdul Ghani v. PP* [2013] 1 LNS 381, the alleged misdirection on the part of the trial judge was somewhat similar to the instant case. It was submitted that the trial judge erred in stating the defence was belatedly disclosed at the defence stage. The Court of Appeal held that even if there was a misdirection by the learned trial judge at the conclusion of the defence case, the proviso to s. 60(1) of the CJA should be applied as there was no miscarriage of justice and the conviction of the accused was safe.

[25] In the instant case, we note that the Judicial Commissioner did not disbelieve the appellant solely on the assumption that parts of the defence were not put to prosecution witnesses. The learned Judicial Commissioner considered the crucial eyewitness evidence of SP13 and SP14. SP13 unhesitatingly told the court that she identified the appellant as the shooter who fired the shots in cold blood as she and her husband lay on the ground. SP14 also identified the appellant as the person who lingered outside the temple for nearly 20 minutes before tailing the deceased and SP13 when they left the temple. She saw the appellant taking out something that resembled a gun and shooting the couple in the back. The learned Judicial Commissioner accepted the evidence of these crucial witnesses. He had no reason not to do so. They had good opportunity to identify the appellant as the incident occurred in quite bright daylight. SP14 had seen him loitering for a while through the window of the temple. SP13 said that the appellant took his time to adjust his gun before shooting at her and the deceased at close range. It is her evidence that in those fateful moments, the face of the appellant was seared into her memory forever. Her agonising recollection of the moment of the shooting bears this out. It is as follows:

> When I fall on the ground and my husband fall on me. We were both facing up. He fell on my lap. I was facing up and look ahead and saw a man in front of me. I looked at his face and then he was meddling with a gun, touching a gun. I described it as meddling. I look at him again and then I put my hand on my husband chest and look at him and look into his eyes and rub my husband chest and he shot at my husband. Then he fled away ...
>
> Q: The incident happened on 29.7.2014. Now it is 14.4.2017. What makes you still recognize the accused?
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> A: He was right in front of my eyes. I saw at him. I looked at his face. I looked into his eyes. He was literally in front of me. **Any my pair of eyes is like stuck into his face until today**. He was so close.
>
> (emphasis added)

[26] Thus, the identification by SP13 and SP14 was not made on a fleeting glimpse of the appellant. Furthermore, there was no suggestion that SP13 and SP14 would have any reason to falsely implicate the appellant in the shootings. He was a total stranger to both of them. In the premises, even if the Judicial Commissioner erroneously misdirected himself by stating that the defence that others were responsible for the shooting was not put to the SP13 and SP14, in our view any other judge who had correctly directed himself would have come to the same conclusion on the evidence.

[27] Insofar as SP3 and SP15 are concerned, the learned Judicial Commissioner considered their evidence as corroborative of the evidence of SP13 and SP14. Their evidence placed the appellant at the scene. SP3 heard firecracker sound shortly after the appellant left the food stall. But the finding of the Judicial Commissioner that the appellant shot the deceased mainly is based on the evidence of SP13 and SP14. Thus, in our opinion, another judge who correctly directed himself on this point, would not have reached a different conclusion.

[28] In the premises, we are of the view that no substantial miscarriage of justice was occasioned by the above-mentioned misdirection on the part of the Judicial Commissioner. In the premises, we hold that by virtue of s. 60 of the Court of Judicature Act 1964, the appeal cannot succeed on the said ground of misdirection alone. We now turn to the other grounds argued before us.

Acceptance Of Evidence Of SP3

[29] Counsel for the appellant criticised the assessment of the credibility of SP3 by the Judicial Commissioner. He submitted that the evidence of SP3 was accepted at "face value" without further scrutiny. He said the Judicial Commissioner failed to appreciate that SP3 was also a suspect in the shooting and that he was later charged for possession of a firearm. SP3 also admitted that he had gone to Cambodia for firearms training. Furthermore, although SP3 said that he found an ammunition magazine in his taxi, he did not report it to the police.

[30] We find no merit in the above submission for the following reasons. Firstly, it must be noted that SP3 was a competent witness. He was not charged as an accomplice in the instant case and his evidence does not require corroboration. He was charged for the offence of firearm possession after his arrest. However, according to the investigating officer (SP6, DSP Ananthan a/l Rajoo), ballistics examination confirmed the said firearm was not the same firearm used to kill the deceased. By the time SP3 testified in court, he was freed from the charge in question. Secondly, it is settled law that the assessment of credibility of a witness is the domain of the trial judge. Unless, the trial judge has seriously misdirected himself, an appellate court should

be slow to interfere with the judgment of the trial court that had audio visual advantage. The Judicial Commissioner said as follows in respect of the credibility of SP3 and SP15:

> Mahkamah ini juga telah menilai secara berhati-hati keterangan SP3 and SP15 dan mendapati bahawa mereka adalah saksi yang kredibel selepas beliau di soal balas dengan begitu teliti dan panjang lebar oleh peguambela. Mahkamah menerima keterangan mereka.

[31] The evidence that SP3 was also arrested and investigated by the police and that he was subsequently charged for a firearm offence was before the Judicial Commissioner. However, after considering his testimony which was subjected to lengthy cross-examination, he concluded that his evidence is credible. We see no reason to find fault with the finding of the Judicial Commissioner. In any event, the evidence of SP3 was consistent with that of SP13 and SP14 who categorically stated that it was the appellant who killed the deceased and not SP3 or SP15.

Identification Parade

[32] The star witness, SP13 told the court that she picked out the appellant at the identification parade that was held on 26 September 2013. The investigating officer of the case told the court that he ordered seven identification parades to be conducted. However, the identification parade report in respect of identification of the appellant by SP13 was not tendered in court. Counsel for the appellant criticised the failure of the prosecution to tender the report into evidence as the defence put to SP13 that no identification parade was held on the day in question. It was put to her that only the appellant was present in the identification parade room.

[33] The reason for not tendering the identification report was not made known. Nonetheless, we are of the view that it is not fatal to the case of the prosecution. This is because the absence of an identification parade does not necessarily mean that the dock identification by a witness loses value. In *Ong Poh Cheng v. PP* [1998] 4 CLJ 1 which was cited by the learned Deputy Public Prosecutor, the High Court Judge rejected the identification of the appellant at the identification parade as defective. Nonetheless, he accepted the dock identification. The Court of Appeal held that the dock identification was rightly accepted and said as follows:

> Generally speaking, an identification at an identification parade, held usually a short time after the incident, would tend to strengthen the prosecution's case but it does not follow that the lack of it would be fatal, or would destroy a court or dock identification. It must necessarily depend on the facts and circumstances of each particular case. Unlike in the case of *Arumugam s/o Muthusamy v. PP* [1998] 3 MLJ 73 where the court relied solely on the dock identification, the present case there are other cogent evidence to put the appellant at the scene of the robbery. The court's

identification was merely to confirm this. On the facts and circumstances of this case, the court or dock identification of the appellant was rightly accepted.

[34] In the case of *Lim Tiong Seng & Satu Lagi lwn. PP* [2011] 5 CLJ 1; [2011] 4 MLJ 411, Ahmad Maarop JCA (as he then was), said that although identification at the identification parade is relevant and constitutes corroborative evidence, the substantive evidence is identification of the accused at the trial. In support, His Lordship cited the case of *Budhsen v. State of UP* [1970] Cri LJ 1149 SC where the Indian Supreme Court said as follows:

> The identification parades belong to the investigation stage. They are generally held during the course of investigation with the primary object of enabling the witnesses to identify persons concerned in the offence, who were not previously known to them. This serves to satisfy the investigating officers of the *bona fides* of the prosecution witnesses and also to furnish evidence to corroborate their testimony in Court. Identification proceedings in their legal effect amount simply to this; that certain persons are brought to jail or some other place and make statements either express or implied that certain individuals whom they point out are persons whom they recognise as having been concerned in the crime. They do not constitute substantive evidence.

[35] In the instant case, as in the case of *Ong Poh Cheng v. PP* (*supra*), the prosecution did not rely solely on the evidence of dock identification of one witness. Apart from the evidence of SP13, the prosecution also relied on other evidence to identify the appellant as the shooter. We referred to the crucial evidence of SP14 earlier. She noticed the appellant through the temple's window. He loitered outside the temple for a while before firing shots at the victims when they walked towards the parking lot. SP3 and SP15 also implicated the appellant. The still images taken from the CCTV recording showed that the appellant followed the victims from behind when they emerged from the temple. Finally, the quality of the dock identification of SP13 must also be considered. She explained several times during her testimony why she remembered the face of the appellant. We reproduced her evidence earlier. The appellant shot her and her husband in cold blood at point blank distance after adjusting his gun. The learned Judicial Commissioner accepted her evidence of identification in court. In the premises, the failure on the part of the prosecution to tender the identification parade report is of no consequence.

Ballistics Report And CCTV Recording

[36] The police sent the firearm which was the subject matter of the firearm possession charge against SP3 for ballistics examination. The decision of the prosecution not to tender the ballistics examination report in evidence was criticised by counsel for the appellant as it is the defence of the appellant that SP3 and SP15 shot the deceased and his wife. The prosecution's case is that

the weapon used to shoot the deceased and his wife was never recovered. The investigating officer told the court that the appellant brought the police to a lake to search for a gun. But police did not manage to find the weapon. The investigating officer whose evidence was accepted by the Judicial Commissioner testified that the ballistics examination of the bullets taken from the scene of crime did not match the gun recovered from SP3. He said as follows:

> ... polis telah membuat perbandingan karakteristik peluru yang dijumpai di tempat Hussin ditembak dengan peluru yang dirampas dari SP3 dari sebuah kondo di Jalan Kelang Lama di OUG tidak mempunyai karakteristik yang sama dan juga peluru dijumpai di tempat kejadian Hussin ditembak jenis 9mm Luger Rai D9 manakala peluru dirampas dari SP3 adalah jenis 9mm shot (smb).

[37] In the premises, we are of the view that the failure of the prosecution to tender the ballistics examination report in the instant case is a non-issue.

[38] The investigating officer (SP6) testified that he viewed the CCTV recording of the shooting incident and determined that the shooter was the appellant. A copy of the CCTV recording was supplied to the defence before the trial. However, the copy of the CCTV recording was not tendered in court. Learned counsel for the appellant criticised the omission to tender the CCTV recording. However, he did not explain how the omission prejudiced the defence. We fail to see why this is an issue. Firstly, the prosecution did not suppress any evidence as a copy of the recording was given to the defence. If there was something in the recording that was favourable to the appellant, the defence could have brought it to the attention of the court. Secondly, numerous still images of scene of crime and the appellant that were taken from the CCTV recording were tendered in court. Thus, the omission to tender the CCTV recording did not cause a gap in the prosecution's case. Furthermore, the learned Judicial Commissioner relied primarily on the unshaken eyewitness testimony of SP13 and SP14 in convicting the appellant. In the premises, we see no merit in this ground of appeal.

Criticism Of The Defence

[39] The final point taken by the counsel for the appellant was that the learned Judicial Commissioner misdirected himself when he criticised the defence as afterthought, a bare denial and a concoction. It follows that the defence was not properly considered. Counsel for the appellant summarized the defence of the appellant as follows. The appellant was not the shooter. The actual shooters were SP3 and SP15 who shot both deceased and his wife (SP13). The appellant went to the scene at the behest of SP3 to discuss something with him. The appellant had explained why he left for Taiping after the shooting. It was urged upon us that the explanation was not considered by the Judicial Commissioner.

[40] In our view, there is no merit in the submission that there was insufficient judicial appreciation of the defence and therefore the appellant was deprived of a fair trial. Our reasons are as follows. In paras. 44 to 54 of his grounds of judgment, as submitted by the prosecution, the learned Judicial Commissioner considered carefully the defence of the appellant and compared it with the evidence presented by the prosecution. However, he disbelieved the defence and also found that it did not raise a doubt in the case of the prosecution.

[41] The appellant told the court that he ran away to Taiping because he was worried after seeing a television report of the shooting incident. The learned Judicial Commissioner did not accept his explanation as being consistent with his innocence after considering the overall circumstances of the case. The appellant had his phone with him at the time of the shooting but he did not report SP3 and SP15 who were the alleged culprits to the police. He claimed to have been invited to the temple food stall in question to discuss some matter with SP3. But he was unable to reveal the reason that he was called by SP3 or the details of any discussion he had with SP3 or SP15 on that day. The appellant agreed during cross-examination that after he was arrested in Taiping, he did not tell the investigating officer that it was SP3 and SP15 who shot the deceased and his wife. That was the earliest opportunity for him to disclose his defence. For all the above reasons, the learned Judicial Commissioner disbelieved the appellant and also found that his defence did not raise reasonable doubt. It is plain from his judgment that he fully evaluated the defence before concluding that it was an afterthought and a concoction. In the light of the evidence presented in this case against the appellant and the reasons given by the learned Judicial Commissioner, we cannot say that he erred in making this finding.

Conclusion

[42] In conclusion, we find the conviction of the appellant on the charge of murder and the charge of attempted murder to be safe. There is no merit in any of the grounds or issues raised by learned counsel for the appellant. The evidence that the appellant murdered the deceased and attempted to murder his wife is simply overwhelming. We therefore affirm the said convictions and the sentences imposed by the learned Judicial Commissioner.